

IN THE CIRCUIT COURT OF PHILLIPS COUNTY, ARKANSAS

CRIMINAL DIVISION

STATE OF ARKANSAS

PLAINTIFF

VS.

CASE NO. CR-2011-143

TONY BERNARD SMITH

DEFENDANT

ORDER

Now on this 16th day of August 2013, comes on now the matter of the appointment of a special prosecutor in the above referenced case. The Court being well and sufficiently advised do make the following findings of fact and conclusions of law and doeth Order:

This Court previously entered an Order denying the State's Motion to Nolle Prosequi this murder case. Defendant filed petitions with the Arkansas Supreme Court on or about May 31, 2013, for Writ of Mandamus, Writ of Prohibition and Writ of Habeas Corpus. On or about June 6, 2013, the Arkansas Supreme Court issued the following Per Curiam Orders:

CR-13-480 TONY B. SMITH V. J.R. SMITH, SHERIFF OF THE CROSS COUNTY AND CROSS COUNTY DETENTION FACILITY, FROM CROSS CIRCUIT. MOTIONS FOR ACCELERATED CONSIDERATION ARE GRANTED. PETITION FOR WRIT OF HABEAS CORPUS. MOOT. AMENDED PETITION FOR WRIT OF HABEAS CORPUS DENIED WITHOUT PREJUDICE. CORBIN, J., NOT PARTICIPATING. (PROCEEDINGS OF JUNE 6, 2013)

FILED
At 4:40 O'Clock P M
AUG 16 2013
LYNN STILLWELL
PHILLIPS COUNTY CIRCUIT CLERK
By _____ D.C.

CR-13-481 TONY BERNARD SMITH V. HONORABLE JUDGE L.T. SIMES, CIRCUIT COURT JUDGE OF PHILLIPS COUNTY, ARKANSAS, CRIMINAL DIVISION, FROM PHILLIPS CIRCUIT. MOTIONS FOR ACCELERATED CONSIDERATION ARE GRANTED. PETITION FOR WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, FOR CERTIORARI MOOT, PETITION FOR WRIT OF PROHIBITION OR, IN THE ALTERNATIVE, FOR CERTIORARI IS DENIED WITHOUT PREJUDICE. HANAH, C.J., AND DANIELSON, J., WOULD GRANT WRIT OF CERTIORARI. CORBIN, J., NOT PARTICIPATING. (PROCEEDINGS OF JUNE 6, 2013)

This Court is now faced with its judicial obligation to uphold its duty as a sworn magistrate. Therefore, in preparation the Court has done extensive legal research and read a number of legal treatises. The Court has reviewed *Westlaw Criminal Procedure, Section 13.3 (f), 4 Crim. Proc., Section 13.3 (f) (3d ed.)*. This legal treatise analyzes the subject of *Removal and Appointment of a Special Prosecutor*.

§13.3(f) Removal; special prosecutor

“Various mechanisms are available in the several states by which a local prosecutor might be removed from office. Impeachment is the most common method of removal, but some states have provided for removal by the governor, removal by a court, removal on a recommendation of the Attorney General, impeachment by the legislature, or recall by the electorate. [52] The grounds for removal vary among the states. “Grounds for removal include such causes as ‘malfeasance, misfeasance, nonfeasance, or non-administration in office,’ ‘incompetency, neglect of duty or misuse of office when such incompetency, neglect of duty or misuse of office has a material adverse effect upon the conduct of such office,’ and incompetency, corruption,

malfeasance or delinquency in office, or other sufficient cause.' Disbarment and conviction of a serious crime are other common grounds for removal."

"Another possibility is that prosecutor will be replaced with respect to a particular case by a special prosecutor. Considerable authority is to be found in support of the validity of an appointment of a special prosecutor under some circumstances. [56] The need for the services of a special prosecutor may arise because the "prosecuting attorney is legally precluded from proceeding due to a conflict of interest," because he "is faced with a difficult case beyond his investigative and legal abilities," or because there "is corruption within the judicial/government system, and public confidence requires an 'uninvolved' outsider to investigate.....prosecute...

The relevant legal statute with which the court must look to is *Arkansas Code Annotated 16-21-112*.

Arkansas Code Annotated §16-21-112

Prosecuting attorney pro tempore. (a) If any prosecuting attorney neglects, or fails from sickness or *any other cause*, to attend any of the courts of the district for which he was elected and to prosecute as required by law, it shall be the duty of the court to appoint some proper person, being an attorney at law, to prosecute for the state during the term. That person shall, on taking the oath of office, perform all the duties of the regular prosecuting attorney for the term.

The Arkansas Supreme Court held in *Weems vs. John Anderson, 516 S.W. 2d 895*, that:

"Contention that a special prosecutor must be a resident of the judicial district in which he is appointed to serve held without merit in view of specific statutory provisions which merely require the special prosecutor be an attorney at law." [*Ark. Stat. Ann §§ 24-1 08, 117 (Repl. 1962)*]

As discussed herein there are several cases in Arkansas which address this issue. Indeed the issue of the appointment of a special prosecutor was at the heart of the *Venhaus vs. Brown*

decision (286 Ark. 229) 1985. In *Venhaus v Brown* the Arkansas Supreme court held:

“The circuit court does not have the inherent authority to appoint a special prosecuting attorney without the incumbent being legally removed or legally disqualified to act unless the incumbent prosecuting attorney is being investigated for, or charged with, illegal activity. The court also held: In limited circumstances, a circuit court has the authority, outside of statutory authority, to appoint a special prosecutor, without the removal or disqualification of the incumbent, those circumstances being when the incumbent prosecuting attorney is being investigated or charged with an illegal activity.”

In the *Venhaus vs. Brown* case the circuit judge did not disqualify the prosecutor. The Court stated, “on February 2, 1983, without entering an order disqualifying the prosecuting attorney, the circuit judge appointed Darrell Brown as special counsel to the special grand jury “ It also should be noted that in *Vehanus, supra*, the prosecutor wrote the circuit judge a letter and stated, “If after reading the transcript you are of the opinion that this case should be tried. I will disqualify and acquiesce in the appointment of a special prosecutor to file and try it.

The circuit judge however appointed the special prosecutor without making a determination that the prosecutor was indeed disqualified. As discussed herein there are some distinguishable points about the *Venhaus* Case and *State vs. Tony Smith*. First, initially in *Venhaus*, the prosecutor felt the Defendant was innocent and refused to file an indictment.

On the other hand in *State vs. Smith* the prosecutor strongly believed Tony Smith was guilty of capital murder and did indeed file the indictment. In fact one of the leading cases on the issue of appointment of a special prosecutor is *Brown v. Venhaus supra*. However, the case at bar is distinguishable in a number of ways. Secondly, no criminal information was filed in the *Brown* case. On the other hand, on July 26, 2011, Prosecuting Attorney Fletcher Long and Deputy Prosecuting Attorney Todd Murray filed the following indictment:

I, Fletcher Long, Prosecuting Attorney within and for the First Judicial District of the State of Arkansas, of which Phillips County is a part, in the name and by the authority of the State of Arkansas, on oath, accuse the Defendant, Tony Smith, of the crime(s) of:

Code	Offense	Q C E	F/M	Cnt
5-10-101	Capital Murder	Y	F	1
5-12-103	Aggravated Robbery	Y	F	2

against the peace and dignity of the State of Arkansas, committed as follows, to-wit:

Count 1: The said Defendant on or about the 28th day of April, 2011, in Phillips County, Arkansas, did unlawfully commit aggravated robbery, and during the course of and in furtherance of the said felony, did cause the death of Michael Campbell, by shooting him in the chest, under the circumstances manifesting an extreme indifference to the value of human life, and

Count 2: The said Defendant on or about the 28th day of April, 2011, in Phillips County, Arkansas, did unlawfully and with the purpose of committing a theft, employ or threaten to immediately employ physical force upon another, namely Michael Campbell, while armed with a deadly weapon, against the peace and dignity of the State of Arkansas.

Capital Murder is classified as a Class Y Felony and a Capital offense. A person convicted of a Capital Offense shall be punished by death by lethal injection or by life imprisonment without parole in the Arkansas Department of Correction, pursuant to the laws of the State of Arkansas, A.C.A. 5-10-101 and 5-4-601, et seq.

The following aggravating circumstances existed at the time of the commission of the capital murder:

In the commission of the capital murder, the defendant knowingly created a great risk of death to a person other than the victim.

The capital murder was committed for the purpose of avoiding or preventing an arrest or effecting an escape from custody.

The capital murder was committed for pecuniary gain.

The State will offer any aggravating circumstances supported by the evidence.

Aggravated Robbery is a Class Y felony punishable by not less than ten years nor more than forty years, or life imprisonment in the Arkansas Department of Correction.

Fletcher Long
Prosecuting Attorney

By: Signature of Todd H. Murray
Todd H. Murray, D.P.A.

When the prosecutor filed the above indictment it was their position that a crime had been committed and further that Tony Smith was the guilty party. Also, that there were aggravating circumstances of such a degree that the defendant should receive the **death penalty**.

One interesting consideration is whether or not the Prosecutor has disqualified himself. This certainly is not a proceeding to remove the prosecutor. The prosecutor is duly elected and currently serving a term of office. However, the code does state that should the prosecutor fails from sickness or *any other cause* to prosecute as required by law, it shall be the *duty* of the court to appoint some proper person being an attorney at law, to prosecute for the state during the term. That person shall, on taking the oath of office, perform all the duties of the regular prosecuting attorney for the term. *See: Arkansas Code Annotated §16-21-112 supra;*

On June 3, 2013, this court entered an order denying the state Motion to Nolle Prose. At the hearing Prosecutor Attorney Fletcher Long stated, "Your honor the state of Arkansas is going to move to nolle prosequi this case. We have a written motion to that effect. Our reason for doing so is essentially one witness who testified that she is an eye witness however her testimony is inconsistent within itself, with the facts and inconsistent with the testimony of other witness.....neither Mr. Murray nor I can stand in front of this podium or stand in front of a Jury and argue in good conscious that this defendant is guilty of this crime, because we have serious reservations about it ourselves."

Does this statement in and of itself disqualify the prosecutor? The dissent in *Venhaus, Supra* does shed some light on the question.

Justice Purtle wrote a dissenting opinion in *Brown v. Venhaus*. Notwithstanding, his dissent is relevant to this inquiry. In the dissent Justice Purtle wrote as follows:

“JOHN I. PURTLE, Justice, dissenting. I again respectfully dissent. It is my opinion that the elected prosecuting attorney did in fact disqualify himself in this case. True, there was no formal pronouncement that he could not in good conscience prosecute the case against the named defendant.Perhaps the circuit judge should have made a definite determination about the matter before appointing a special prosecutor but he did not. I think he was so closely associated with the facts of the case that he took it for granted that the prosecutor had in fact disqualified in the particular case.”

It is the finding and conclusion of this Court that the statements made in open court by the prosecutor are in fact a formal announcement of his disqualification. After the Supreme Court denied the various writs as set forth above, this Court reached out to the prosecutor in an effort for him to agree to a disqualification in this *individual* case. After patiently waiting weeks for a response the court contacted the prosecutor who advised the court as follows: “I will not disqualifyIts a matter of separation of powersit sets a dangerous precedent... prosecutors have statutory authority and a constitutional function “ This Court understands the opinion and position of the Prosecutors. It is however the duty of the Court to review the statutes, case law and make a determination and decision with respect to the appointment of a special prosecutor. From the Court's examination of the case law and statutes justice requires that this decision be rendered.

This case presents another example of guns and violence in Phillips County. There has been a tremendous amount written about the Justice System in this County. On May 14, 2012, the following article was published. ***“Criminal cases fade away in Phillips County, Alling Courts Tilts in Defendants' Favor,*** By Cathy Frye and Chad Day...” in this small but storied

town an overburdened and outdated court system allows criminal cases to languish in circuit court for years, only to be forgotten or dropped, an Arkansas Democrat Gazette investigation shows "The Tony Smith case is yet another example. This case has been pending over two years. The article also stated,

"repeated continuances and an overloaded docket results in case dismissal because some trials are not held within the time limit set by law"Assistant U. S. Attorney Julie Peters who is trying the Delta Blues drug conspiracy cases has noted that the number of "nolle prossed" cases in Phillips county is an **eyebrow-raiser**".....

The Courts decision filed on June 3, 2013, denying the Motion to Nolle Prose is incorporated herein word for word and line for line. A murder has indeed occurred and justice requires that the guilty party be brought to justice. Phillips County is in desperate need of jobs and economic improvement and the public must have confidence in it's judicial system.

On or about October 2011, the federal government held a press conference in Phillips County, Arkansas. Many agencies of the United States were present. To the surprise of virtually everyone, the U.S. Attorney Christopher Thyer conducted a press conference at the Phillips Community College of the University of Arkansas announcing a undercover operation given the name, "Operation Delta Blues", a drug and corruption investigation. Approximately seventy (70) Defendants were arrested, numerous arrestees were local police officers and deputy sheriffs. It should be noted that there have been various convictions.

Many television and newspaper reports were published. It appears that this was a corruption and drug investigation. Indeed this corruption investigation made national news. Periodically, ever since October 2011, a great number of public reports including contents of wire taps and federal investigation information has been publicized.

Unknown to this Court a Delta Blues Defendant name Cedric Trice had been sentenced by this Court to twenty (20) years in the Arkansas Department of Corrections. Trice lead a multi-

state drug trafficking ring in Helena-West Helena, Arkansas. This court sentenced him to twenty (20) years in the Arkansas Department of Corrections and ordered a one hundred and fifty thousand dollar (\$150,000.00) cash appeal bond. Notwithstanding, instead of being taken to prison Trice remained free, continuing to cook drugs, arm his dealers, broker sales and manage deliveries even after the Arkansas Court of Appeals upheld the twenty (20) year sentence this Court has pronounced.

This set of events adversely reflect upon the judicial system of Phillips County, Arkansas. The citizens of Phillips County deserve a fair and impartial judicial system. The Court had ordered a one hundred and fifty thousand dollar (\$150,000.00) cash bond, but without the knowledge or approval of this Court this Defendant was released. The Arkansas Democrat Gazette reported that for much more than a year this convicted criminal was in and out of jail while simultaneously being the King Pin of a three state drug operation. These reports which are state wide and nationally have caused many citizens in Phillips County to question the integrity of the judicial system from the top to the bottom. For much of the time Cedrick Trice was operating in Phillips County he should have been in state prison, so reported the *Arkansas Democrat Gazette April 19, 2012, Drug Kingpin in Delta Gets 40 Years To Rectify Unserved Time, Term to Run Concurrently.*

The Deputy Prosecuting Attorney handling Tony B. Smith case is Todd Murray. Several Arkansas Democrat Gazette articles have raised an issue concerning cases nolle prossed based upon Todd Murray's motion. The Arkansas Democrat Gazette publish wiretap statements by a federal defendant's whose father owns a local night club. Allegedly, the son claimed his father had paid hundreds of thousands of dollars to get cases against him and his sister dismissed. The article reported that Deputy Prosecuting Attorney Todd Murray had indeed motioned to nolle

prosse many cases of this criminal defendant and his sister cases. (See **Arkansas Democrat Gazette Article**)

About six months ago, on or about December 12, 2012, the Arkansas Democrat Gazette published an article, "*Informant Tell Jury He Hired Officer to Escort Drugs*". That article further states: that a federal agent disclosed that their informant had secretly recorded Phillips County Sheriff Ronnie White as a part of the FBI public corruption investigation. It should be noted that this Murder arrest occurred April 2011, about six (6) months before the October public news conference, "Operation Delta Blues".

The investigation affidavit for warrant to arrest Tony Smith is signed by former Sheriff Ronnie White and signed by Deputy Prosecutor Attorney Todd Murray. The above newspaper article stated that Coleman, "**undercover informant**" alleged that he once paid Phillips County Deputy Prosecuting Attorney Todd Murray in exchange for assistance with a drug arrest. The article stated, "Todd Murray ended up getting thirty thousand dollars (\$30,000.00) under the table in cashier's check on that deal." A previous Arkansas Democrat Gazette Articles reported that certain Delta Blues defendants were secretly recorded stating they had paid very large sums of money to Todd Murray to have numerous cases nolle prossed. The newspaper listed an extensive list of serious felonies that were indeed nolle prossed . It is noted that Mr. Murray wholeheartedly publicly denies these charges.

The Arkansas Supreme Court held in *Venhaus supra*, "Circuit court has authority, outside of statutory authority, to appoint a special prosecutor, without removal or disqualification of incumbent in limited circumstances that exist when incumbent prosecuting attorney is being investigated or charged with illegal activity; upon occurrence of such circumstance there is in a very real sense a vacancy in representation of public, and circuit court is constitutionally vested

with authority to fill temporary vacancy with appointment of special prosecutor. *Const. Art. 7, §24; Amend. No. 21, §1.*”

See *Weems v. Owens Supra* for the following: For other authorities upholding the inherent authority of the court to appoint a special prosecutor when the State's attorney is under investigation, see *Williams vs. State,, 188 Ind. 283, 123 NE 209 (1919) State v. Jones, 306 Mo. 437, 268 SW 83 (1924), 31 ALR 3rd 953, 986-988 (1970) and 65 Yale Law Journal 209, 216, 217.*

The Arkansas Supreme Court stated in *Venhaus v. Brown supra*, “in limited circumstances, a circuit court does have the authority outside of statutory authority, to appoint a special prosecutor without removal or disqualification of the incumbent. Those limited circumstances exist when the incumbent prosecuting attorney is being investigated or charged with illegal activity. *Weems and Owen v. Anderson, supra. See Also 84 A.L.R. 3d 115.* Upon the occurrence of such a circumstance there is in a very real sense a vacancy in the representation of the public, and the circuit court is constitutionally vested with the authority to fill that temporary vacancy with the appointment of a special prosecutor.

In arriving at a decision in this case the Court has reviewed the Supreme Court decision in the case of *Ford v. State 4 Ark. App. 135, 628 S.W. 2d 340.* The Court ultimately held that the trial court did not abuse it's discretion in failing to disqualify the prosecuting attorney and appoint a special prosecutor. Notwithstanding, the Court did state:

“A special prosecutor may be appointed where the elected prosecutor is indicted for a criminal offense (*Ark. Stat. Ann. 24-108 [Repl. 1962]*), and where the prosecuting attorney is implicated in the investigation of a criminal offense (*Weems v. Anderson, 257 Ark. 376, 516 S.W.2d 895 [1974]*). In the event the prosecutor is unable to perform his duties because of illness or disability, *Ark. Stat. Ann. 24-117 (Repl. 1962)* provides the authority for appointment of a prosecutor in that situation. In *Weems, supra*, the Arkansas Supreme Court stated: The absence of specific statutory authority for the appointment of a special prosecuting attorney under the circumstances of this case does not mean that the court is without authority to do what **justice, reason and common sense** dictate must be done. In other jurisdictions where there was the same lack of statutory authority for the

appointment of a special prosecuting attorney under circumstances such as those here presented, the courts have held that there is an inherent power in the courts to make such an appointment. We hold that the Arkansas Circuit Courts also have such an inherent power."

Operation Delta Blues is an ongoing federal investigation of corruption and drugs. There have been numerous Arkansas Democrat Gazette articles as set forth herein. It is obvious that the prosecuting attorney's office in Phillips County has been implicated in the Delta Blues investigation. These numerous newspaper articles confirm that.

Justice Corbin and Justin Glaze filed a dissenting opinion wherein he stated:

"Court proceedings must not only be fair and impartial, they must also appear to be fair and impartial, not only for the benefit of the litigants directly involved, but this is necessary in order to maintain the public's confidence in the judicial system. *Oliver v. State*, 268 Ark. 579, 594 S.W.2d 261 (1980)."

Additionally, although the majority found no abuse of discretion in *Ford v. State* the comments of Justice Corbin are most relevant to the instant case. Justice Corbin further stated:

"However, we are convinced that this trial lacked the appearance of fairness and impartiality which has been the bedrock of our judicial system."

The appearance of impartiality and fairness is most relevant to the Court's decision herein. The Prosecutor has made a one hundred and eighty degree change in his position. Initially, in April of 2011, he was convinced that the Defendant had committed Capital Felony Murder and should receive the death penalty. Now two years later, the Prosecutor informs the Court that he and Mr. Murray, Phillips County Deputy Prosecuting Attorney will not take this case to a jury trial. Because of the statements of the prosecuting attorney the question now becomes whether or not he can be called as a witness in this case. Competent defense counsel would by necessity make this effort. This creates a potential troubling issue for the Trial Court should the issue be raised in some manner in the upcoming murder trial.

should the issue be raised in some manner in the upcoming murder trial.

The general rule is that an attorney should not act as both trial counsel and a material witness for his client. *Boling v. Gibson*, 266 Ark. 310, 584 S.W.2d 14 (1979); *Enzor v. State*, 262 Ark. 545, 559 S.W.2d 148 (1977); *Jones v. Hardesty*, 261 Ark. 716, 551 S.W.2d 543 (1977); *Dingledine v. Dingledine*, 258 Ark. 204, 523 S.W.2d 189 (1975); *Watson v. Alford*, 255 Ark. 911, 503 S.W.2d 897 (1974)

The authority of a deputy prosecuting attorney is derived from the prosecutor, and it is clear that the deputy prosecuting attorney has no authority independent of that possessed by the prosecutor. *Ark. Stat. Ann. 24-119 (Repl. 1962)*; *Sheffield v. Heslep*, 206 Ark. 605, 177 S.W.2d 412 (1944).

A special prosecutor does not displace the prosecuting attorney from his constitutional office, but in order for him to be effective in the investigation and prosecution of the matters for which he has been appointed, he must have the right, power, and authority to proceed in the same manner as the prosecuting attorney. *See Weems v. Anderson supra*

CONCLUSION

As set forth herein, this Court finds and concludes that Prosecuting Attorneys Todd Murray and Fletcher Long are hereby disqualified. The Court hereby appoints as Special Prosecutor, Attorney Ronald L. Davis, Jr., 323 Center St., Little Rock, Arkansas, 72201. As special prosecutor Attorney Davis does not displace the prosecuting attorneys from their constitutional/statutory office. The Court finds further that in order for Attorney Davis to be effective in his investigation and prosecution of this matter he is granted by Order of this Court the same rights, powers, and authorities to proceed in the same manner as the duly elected prosecutor.

The Court hereby orders and directs that all law enforcement officers/law enforcement

agencies including the Phillips County Sheriff Department, the Helena-West Helena Police Department, or others who have participated in the arrest, detention and prosecution of this matter to cooperate fully with the special prosecutor as he performs his duties as ordered by this Court.

This matter is hereby scheduled for jury-trial beginning Monday, September 16, 2013, in the Phillips County Circuit Courtroom, Helena-West Helena, Arkansas beginning at 9:00 a.m..

IT IS SO ORDERED.

L.T. Simes II

The Honorable L.T. Simes, II
First Judicial District, Division 1

8/16/13

Date